

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-184401

DATE: August 3, 1976

MATTER OF:

Delta Scientific Corporation

61264
98760

DIGEST:

1. Protest against sole-source nature of a solicitation is untimely when not filed before date for receiving initial proposals.
2. Where merits of untimely protest involve issues considered in previous decisions, such issues are not "significant" within the meaning of § 20.3(c) of our Bid Protest Procedures so as to permit a decision notwithstanding the protest's untimeliness.
3. Late proposals that offer and can be shown to meet the capabilities required of a "sole-source" may be considered for award so long as the Government believes the item can be evaluated and supplied within the time constraints of the sole-source procurement.
4. If an agency lacks sufficient specifications to evaluate a late proposal under a sole-source procurement, the proposal cannot be considered for award. Whether there is enough information available to compare the proffered item with the Government's minimum needs is a factual question. This Office cannot substitute its judgment for that of the requiring agency as to the technical merits of a proposal when the agency has only been able to specify its minimum needs in terms of a brand name.

Delta Scientific Corporation (Delta) has protested the award of a contract under request for proposals (RFP) No. N00140-75-R-0651 for 61 boiler feedwater dissolved oxygen analyzers.

We will first consider the timeliness of certain issues raised in Delta's protest and whether those issues, if untimely, are significant.

The RFP, issued on April 4, 1975, stated, in effect, that a sole-source procurement was contemplated of the Rexnord Instrument Products, Inc. Model Number 500 boiler feedwater dissolved oxygen measuring system. The Commerce Business Daily (CBD) synopsis of April 8, 1975, noted that the Navy proposed to negotiate solely with Rexnord and indicated that the closing date for receipt of proposals would be April 24, 1975. On June 6, 1975 Delta submitted its proposal Number 75-608 offering to meet the Navy's minimum needs provided that (1) the closing date would be extended officially and (2)

the "sole-source" requirement be deleted from the RFP. By letter of July 2, 1975, the Navy informed Delta that its proposal could not be considered, ostensibly because there was insufficient time for ship-board testing, and no specification existed setting out alternative testing procedures.

On July 7, 1975, Delta protested the Navy's refusal, *inter alia*, to consider Delta's proposal essentially on the grounds that there was no legal basis for procuring the analyzers as a sole-source item.

To quote Delta, the essence of its protest is that:

"Sole-source negotiation procurement is not justified or authorized by statutes and regulations under the facts presented above. We also contend that the use of brand names as a substitute for a specification is entirely unwarranted and the RFP is otherwise so defective that an award cannot be made thereon."

In our view Delta's protest as to matters relating to the sole-source nature of the procurement is based upon alleged improprieties in the solicitation which were apparent prior to the date set for receipt of proposals. We cannot agree with Delta that the Navy's encouraging Delta to submit a proposal constituted a "constructive" extension for receipt of proposals. The fact that Delta conditioned its proposal on an amendment to the solicitation belies its assertion that it believed the Navy had offered to extend the date for receipt of proposals. We must conclude, therefore, that under the rule in Del Norte Technology, Inc., B-182318, January 27, 1975, 75-1 CPD 53, Delta's protest is untimely as to matters apparent on the face of the solicitation, since it was filed more than two months after the closing date for receipt of proposals as announced in the CBD.

Delta argues that Del Norte is not applicable here, because Del Norte dealt only with notice of adverse agency action consisting of notice of award appearing in the CBD. However, the broader proposition of Del Norte is that a protester receives notice of any adverse agency action published in the CBD. As Delta notes, the April 8, 1975 CBD, issue number DSA-6298, stated that the Navy "proposes to negotiate solely with Rexnord." A statement of that nature would appear to constitute notice to Delta that any proposal submitted under the RFP by Delta would not be considered. Since Delta contends that this alleged impropriety appeared on the face of the solicitation prior to the date for receipt of proposals, then Delta's protest is untimely and, under § 20.2(b)(3), " * * * shall not be considered * * * " unless under § 20.2(c) the Comptroller General finds "good cause shown" or "where * * * a protest raises issues significant to procurement practices * * *."

Delta contends that the procurement practices engaged in by the Navy warrant serious consideration and corrective action by our Office. Moreover, Delta states that the facts in our decision Non-Linear Systems, Inc., B-183683, October 9, 1975, 75-2 CPD 219 are, in many respects, identical to those in the Delta protest. Assuming that Delta is correct in its allegation regarding the Navy's procurement practice, and also assuming that we agree with Delta that our holding in Non-Linear Systems would be dispositive of the issues raised by Delta in this case, then we have already expressed our views on those issues in Non-Linear Systems and would have, therefore, no need to consider them here. Eastern Microwave Corporation, B-181380, March 12, 1975, 75-1 CPD 147.

Accordingly, the protest is dismissed with regard to issues that should have been raised prior to the date set for receipt of initial proposals.

The only basis on which Delta's protest can be considered is with regard to Navy's rationale for refusing to consider for award Delta's late proposal after having "evaluated" it.

Delta contends that its Model 8309 PPB [parts per billion] Analyzer meets or exceeds the performance of the equipment called for in the RFP. Moreover, Delta infers from the Navy's letter of July 2, 1975 that Delta's proposal was rejected merely because Rexnord's product was "determined to be superior." Delta notes that there is nothing particularly unique about the design or manufacture of Rexnord equipment or that of Delta. In fact, Delta observes, of the seven components making up the Rexnord system, five are commercially available and are components of the Delta system. Moreover, Delta contends that it manufactures components "equal" to the remaining two of the seven.

The Navy's position is that it requires more than "a simple package of commercially available instruments." Numerous problems were encountered by Rexnord in achieving a suitable modification of its commercial unit for shipboard use, according to the Navy's report. The facts that an initial draft of a specification for oxygen analyzer systems has cost over \$7,000 to prepare and is more than 30 pages long are, according to the Navy, not indicative of a "simple package."

We do not agree with Delta that the Navy's letter of July 2, 1975 stated only that Rexnord's product was superior. The letter stated quite clearly that:

"The initial procurement must be limited to equipment which has proven effective and reliable during an extended period of actual shipboard use. At the present time, the Navy does not have an adequate specification for competitive procurement which would clearly describe essential functional and physical requirements together with meaningful test procedures to determine whether a given unit actually meets these requirements. * * * First article testing under this procurement is not designed to evaluate the overall functional and operational effectiveness of the equipment in a shipboard environment. The cognizant technical activity has advised this Office that a specification is in preparation and that future procurements for this equipment will be on a competitive basis."

While Delta contests the Navy's determination either that it requires a system that has been shipboard tested or that Rexnord is even supplying such a system, the fact remains that the Navy only stated its requirements in terms of a system with shipboard-tested reliability. It is also clear that the Navy had no way of determining whether Delta's proposed equipment could meet the reliability criterion. Our cases suggest that, regardless of the proposal's lateness, agencies may consider any proposal for award pursuant to a sole-source solicitation, if such proposal offers and can be shown to meet the Government requirements within the "time constraints of the procurement." See, e.g., NORTEC Corporation, B-180429, May 23, 1974, 74-1 CPD 283. If, however, the agency lacks sufficient specifications against which to evaluate the proposal, in this case specifications as to tests to establish system reliability, then the proposal cannot be considered for award. North Electric Company, B-182248, March 12, 1975, 75-1 CPD 150. Moreover, whether an offeror has presented information sufficient to convince the cognizant procuring activity that the proffered item meets the agency's minimum needs as to reliability is essentially a technical judgment committed to an agency's discretion. North Electric, supra.

Delta has, in effect, attempted to show an arbitrary exercise of the Navy's discretion by submitting the report of an approved Navy laboratory to prove Delta's system's acceptability. The laboratory concluded only that Delta's system was, with one exception, "fully qualified to the vibration requirements of MIL-STD-167B (5-33Hz) and the H.I. shock requirements of MIL-S-901C (Navy), Grade B." Delta cannot show, however, that the Navy has established such shock and vibration requirements as its minimum needs as to system reliability. Therefore, the test results cannot be evidence that the Navy abused its discretion when it determined that it could not measure the reliability of Delta's system. We wish to emphasize that, although the Navy has asserted subsequent to July 2, 1975, that Delta's proposal did not meet the Navy's minimum requirements in such areas as display of visible alarms, vibration requirements, shock requirements, operational range requirements, accuracy/precision requirements, and system configuration, we believe that the dispositive issue in this case is whether Delta could show the Navy that Delta had produced a reliable system capable of performing in a shipboard environment. Since the Navy had no specification providing an alternative testing procedure to duplicate shipboard environment and since Delta has shown no commercial application of its system that the Navy could reasonably find equivalent to a shipboard environment, then the Navy simply could not evaluate Delta's proposal in that critical area. That being the case, Delta's proposal could not have been considered for award.

For the reasons stated above, the protest is denied.

R. F. K. 11-11-75
Deputy Comptroller General
of the United States